No. 15786

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DONALD ROBERT MATHES,

*Defendant-Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Plaintiff-Appellee.*

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## APPELLEE'S BRIEF.

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LAUGHLIN E. WATERS,
*United States Attorney,*

LLOYD F. DUNN,
*Assistant United States Attorney,*
*Chief, Criminal Division,*

600 Federal Building,
Los Angeles 12, California,

*Attorneys for Appellee,*
*United States of America.*



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### I.

### JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Southern District of California denying the Motion of Appellant to Modify and Vacate a Sentence in Case No. 25442-CD of said court.

The jurisdiction of the district court is founded upon Section 3231, Title 18, U. S. C. The petition to vacate the original judgment was made by appellant pursuant to Section 2255, Title 28, U. S. C. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, U. S. C. and under Rules 37 and 39 of Federal Rules of Criminal Procedure.

## II.
## STATEMENT OF FACTS.

Appellant was indicted at Los Angeles, California, on November 21, 1956 with others in a five-count indictment alleging violations of Title 21, Section 174, U. S. C., sales of heroin and conspiracy to sell heroin. Appellant was named in substantive counts one and four and in the conspiracy count five. He was arraigned on January 28, 1957. The Court appointed Andrew J. Davis, Esq., as his Counsel. Appellant pleaded not guilty at that time. On February 12, 1957, at the time set for trial, appellant asked for permission to withdraw his previous plea as to counts one and five for purposes of entering different pleas. The motion was granted and appellant then pleaded guilty to counts one and five. He was not tried. Two of his co-defendants were tried and found guilty on all counts in which they were charged. The fourth co-defendant plead guilty under Rule 20 in the Federal District Court for the Northern District of California.

The act alleged in count one of the Indictment occurred on September 12, 1956. The overt acts alleged in count five commenced September 12, 1956 and continued to October 23, 1956.

The sentence as to appellant Mathes was set for 11:00 A.M. on March 4, 1957 before the Honorable Thurmond Clarke, United States District Judge. At 10:55 A.M. on that date, in the absence of Counsel for the Government and for appellant, the court purported to sentence appellant to two years imprisonment, to suspend execution of said

sentence, and to place appellant on probation for a period of two years. Defendant was thereupon permitted to leave. At 11:00 A.M., government counsel, Assistant United States Attorney Louis Lee Abbott, appeared, and upon learning of the court's improper action (in that Section 174 then and now precludes suspension of the execution of sentence and precludes the granting of probation), made a motion to vacate the illegal sentence and for issuance of a bench warrant to return appellant to court for legal sentence. The court did vacate the sentence and continued the matter until 2:00 P.M. of the same day. At that time appellant was present in person and was represented by counsel. The court thereupon sentenced him to five years imprisonment on each of counts one and five, the sentences to run concurrently. The Government then moved to dismiss count four, which motion was granted by the court.

No appeal was taken from the sentence.

On September 24, 1957, appellant filed a motion with the trial court to vacate and set aside the sentence of March 4, 1957, which motion was denied by the court without hearing. (The foregoing does not appear in the Clerk's Transcript of Record as filed in this matter. Appellee is asking that the record be augmented to include this necessary material to properly qualify appellant's appeal.) Appeal was made from such denial, the court also having granted permission to appellant to proceed *in forma pauperis*.

## III.
## ARGUMENT.

### A.
### General Considerations.

Appellee does not accept the statement that appellant's change of plea from not guilty to guilty was made "in agreement with the Government counsel" (Appellant's Br. p. 1). The Government did indicate that it would not go to trial on count four against appellant in the event that he did plead guilty to the other two counts, which agreement was honored [R. T. p. 16].

Appellee does not accept the inference, from appellant's statement, regarding his "agreement with the court," the inference being that his plea was improperly induced. In this regard it should be noted that on the day of sentence appellant was given the opportunity to withdraw his plea of guilty and to stand trial. He elected to stand on his plea. (Appellant's Br. p. 2.)

Appellant clearly admits that he does not attack the validity of his conviction. (Appellant's Br. p. 2.) He was given the absolute minimum sentence provided by law, and the appeal is absolutely groundless. The only authority cited by appellant is not a federal case. He refers to a state case from Ohio which is one-hundred years old. His argument, in effect, is: "I committed the crime, but the Judge erred in my sentence, hence I do not have to serve the time required for the offense by act of Congress."

Furthermore, appellant, not having appealed the sentence he now complains of, is precluded from raising the point at this time since Title 28, U. S. C., Section 2255 is not to be used as a substitute for appeal.

*United States v. Walker,* 197 F. 2d 287, 288 (2 Cir., 1952), cert. den. 344 U. S. 877;

*Taylor v. United States,* 177 Fed. 194, 195 (4 Cir., 1949);

*Davilman v. United States,* 180 F. 2d 284, 286 (6 Cir., 1950).

## B.

## Error May Not Be Predicated Upon an Invalid Sentence.

Appellant's contention in the instant case has no precedent. In fact, all the authority concerning the issue involved herein is directly *contra* to the position taken by him.

The imposition of a sentence which is at variance with statutory requirements is considered a void act.

*United States v. Bozza,* 155 F. 2d 592 (3 Cir., 1946), affirmed 330 U. S. 160;

*Anderson v. Rives,* 85 F. 2d 673 (App. D. C., 1936);

*Hammers v. United States,* 279 F. 2d 265, 266 (5 Cir., 1922).

In the instant case, the trial court imposed an invalid sentence of two years after appellant's conviction under Title 21, U. S. C., Section 174. Such a sentence is a nullity under this statute. It is provided therein that one convicted of the prescribed offense:

". . . shall be imprisoned *not less than five* or more than twenty years. . . ." (Emphasis added.)

When such a void sentence is imposed by the trial court, it may be corrected at any time. In passing upon this point the court in *United States v. Bozza, supra,* at 595, affirming the conviction and sentence, said:

> ". . . such a sentence may be superseded by a new sentence in conformity to the provisions of the statute. It is no hinderance that the correction—even when it entails a greater punishment—occurs after sentence has been partially served or after the term of court has expired. . . ."

Therefore, even assuming *arguendo* that appellant's detention from 11:00 A.M. on March 4, 1957, when counsel for the United States moved to vacate the void sentences to 2:00 P.M. of the same day when appellant was properly sentenced, was partial service of the original sentence, it does not preclude an increase in punishment because the original sentence had no legal force or effect. It is only when service of a *valid* sentence has begun that the court loses its power to increase the punishment. *Wilson v. Buck,* 137 F. 2d 716, 721 (6 Cir., 1943). Nor is this principle archaic. In *Pollard v. United States,* 352 U. S. 354 (1956) the Supreme Court, in citing *United States v. Bozza, supra,* said, at page ~~561~~ 361:

> *"It is not disputed* that a court has power to enter sentence at a succeeding term where a void sentence had been previously imposed." (Emphasis added.)

It cannot, however, even be assumed that appellant had begun to serve his sentence. In *Oxman v. United States,* 148 F. 2d 750 (8 Cir., 1945), cert. den. 325 U. S. 887, rehearing denied 326 U. S. 804, the appellant was removed to the Marshal's office for a few hours after he had been sentenced. The Judge subsequently discovered that he had sentenced appellant to a lesser term

than he had intended. The Judge then corrected the sentence which was apparently *valid* as it was originally pronounced. The court held that the appellant's punishment could be increased because he had not begun the service of the sentence while he was in the Marshal's office.

Therefore, from the foregoing authorities, it is clear that the appellant in the instant case cannot sustain his contentions.

## C.

## The Resentencing of Appellant After the Initial Void Sentence Had Been Imposed Did Not Put Him in Double Jeopardy.

Because the sentence imposed in the instant case was a void act (*United States v. Bozza,* 155 F. 2d 592, 595 (3 Cir., 1946), it follows that the resentencing which occurred three hours later did not subject the appellant to double jeopardy. The court merely substituted a sentence required by statute for one which the court had no authority to impose. In considering the same question involved herein, the Supreme Court said in *Bozza v. United States,* 330 U. S. 160, 166-167:

> ". . . the fact that petitioner has been twice before the Judge for sentencing and in a federal place of detention during the five hour interim cannot be said to constitute double jeopardy as we have heretofore considered it . . . the sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense."

The instant case is on all fours with the *Bozza* case. Appellant cannot, therefore, claim that the valid sentence he received put him in jeopardy a second time.

## IV.
## CONCLUSION.

(1) The trial court's initial sentence was not provided for by statute; therefore, it was a void act.

(2) There is undisputed authority for the proposition that a void sentence may be corrected at almost any time thereafter.

(3) Appellant's detention of three hours after the initial void sentence and before the resentencing was not partial service of the original sentence, even if such original sentence is assumed to be valid.

(4) Since the initial sentence in the instant case was void, the subsequent valid sentence imposed by the trial court did not place appellant in double jeopardy.

Therefore, the Government respectfully requests that the order and judgment of the trial court denying defendant's motion under Section 2255, Title 28, U. S. C., be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
*United States Attorney,*

LLOYD F. DUNN,
*Assistant United States Attorney,*
*Chief, Criminal Division,*

*Attorneys for Appellee,*
*United States of America.*